

Beth E. Terrell, CSB #178181
Email: bterrell@tmdwlaw.com
Kimberlee L. Gunning, *Admitted Pro Hac Vice*
Email: kgunning@tmdwlaw.com
TERRELL MARSHALL DAUDT & WILLIE PLLC
936 North 34th Street, Suite 400
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 350-3528

Gayle Blatt, CSB #122048
Email: gmb@cglaw.com
Mark Ankcorn, CSB #166871
Email: mark@cglaw.com
**CASEY GERRY SCHENK FRANCAVILLA BLATT
& PENFIELD LLP**
110 Laurel Street
San Diego, California 92101-1486
Telephone: (619) 238-1811
Facsimile: (619) 544-9232

Attorneys for Plaintiff and the Proposed Class

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ROSE MAGYAR, on behalf of herself and all others similarly situated,

Plaintiff,

V.

DELL INC., and DELL FINANCIAL
SERVICES LLC,

Defendants.

NO. 3:12-cv-01899-H-RBB

FIRST AMENDED COMPLAINT

CLASS ACTION

Jury Trial Demanded

Honorable Marilyn L. Huff

Filed: August 1, 2012

FIRST AMENDED COMPLAINT - 1
CASE No. 3:12-cv-01899-H-RBB

1 Plaintiff Rose Magyar (“Plaintiff”) individually and on behalf of all others similarly
2 situated, makes the following allegations and claims against Dell Inc. and Dell Financial
3 Services LLC (“Defendants”), upon personal knowledge, investigation of her counsel, and on
4 information and belief.

5 1. This action seeks redress for business practices that violate the Telephone
6 Consumer Protection Act of 1991, 47 U.S.C. § 227, *et seq.* (“TCPA”).

7 2. The Court has jurisdiction to grant the relief sought by Plaintiff pursuant to 47
8 U.S.C. § 227(b) and 28 U.S.C. § 1331.

9 3. Venue is proper in the district as Plaintiff resides in San Diego County and the
10 actions which give rise to this Complaint occurred in this District.

11 I. PARTIES

12 4. Plaintiff Rose Magyar is a natural person who resides in San Diego County,
13 California, and within the Southern District of California. Plaintiff is the account holder of a
14 cellular telephone number and pursuant to the terms of her contract is charged for each call
15 within the meaning of 47 U.S.C. § 227(b)(1)(A)(iii).

16 5. Dell Inc. is a global information technology company that offers a broad range
17 of computer hardware, software, and consulting services to customers including consumers,
18 small and large businesses, as well as governments. As a regular part of its business
19 operations, it extends credit to consumers and services those debts. It operates from its
20 principal place of business at One Dell Way, Round Rock, Texas, 78682.

21 6. Dell Financial Services LLC is a subsidiary of Dell Inc. As a regular part of its
22 business operations, it extends credit to consumers and services those debts. It operates from
23 its principal place of business at One Dell Way, Round Rock, Texas, 78682.

II. FACTS

1 7. Directly as well as through their subsidiaries, contractors and agents, Defendants
2 employ hundreds of persons at various call centers throughout the country. These calling
3 centers use automatic telephone dialing systems and computerized account information to
4 track, record, and maintain the hundreds of thousands of accounts serviced by Defendants.
5

6 8. Part of Defendants' regular business practice is to make repeated phone calls to
7 persons it believes responsible for paying past-due accounts.
8

9 9. On or before October 14, 2011, Defendants began calling Plaintiff on her
10 personal cellular telephone. At no time relevant to the claims stated herein did she give consent
11 to Defendants to call her cellular telephone using an automated telephone dialing system.
12

13 10. Over the next six weeks, Defendants placed more than one hundred calls at
14 different times to Plaintiff's cellular telephone. Defendants frequently, though not always, left
15 messages using an artificial or pre-recorded voice.
16

17 11. Each of the calls placed by Defendants were made by means of an automatic
18 telephone dialing system as defined by the Federal Communications Commission.
19

20 12. In 1991, Congress enacted the TCPA in response to a growing number of
21 consumer complaints regarding certain telemarketing and debt collection practices. The TCPA
22 regulates, *inter alia*, the use of automated dialing systems. Specifically, section
23 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the
24 absence of an emergency or the prior express consent of the called party.
25

26 13. According to findings by the Federal Communication Commission ("FCC"), the
27 agency Congress vested with authority to issue regulations implementing the TCPA, such calls
are prohibited because, as Congress found, automated or prerecorded telephone calls are a
greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly
and inconvenient. The FCC also recognized that wireless customers are charged for incoming
calls whether they pay in advance or after the minutes are used. *Rules and Regulations*

1 *Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report
2 and Order, 18 FCC Rcd 14014 (2003).

3 14. On January 4, 2008, the FCC issued a Declaratory Ruling confirming that
4 autodialed and prerecorded message calls to a wireless number by a creditor or on behalf of a
5 creditor are permitted only if the calls are made with the “prior express consent” of the called
6 party. *In the Matter of Rules and Regulations Implementing the Telephone Consumer*
7 *Protection Act of 1991* (“FCC Declaratory Ruling”), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43
8 Communications Reg. (P&F) 877, 2008 WL65485 (F.C.C.) (2008).

9 15. The FCC “emphasize[d] that prior express consent is deemed to be granted only
10 if the wireless number was provided by the consumer to the creditor, and that such number was
11 provided during the transaction that resulted in the debt owed.” *FCC Declaratory Ruling*, 23
12 F.C.C.R. at 564-65 (¶10).

13 16. Under the TCPA and pursuant to the FCC’s January 2008 Declaratory Ruling,
14 the burden is on Defendants to demonstrate that Plaintiff gave her express consent to call her
15 cell phone within the meaning of the statute. *See FCC Declaratory Ruling*, 23 F.C.C.R. at 565
16 (¶ 10).

17 17. Plaintiff never gave her express consent to receive calls on her cellular
18 telephone.

19 18. To the contrary, during several of the calls, Plaintiff clearly and unequivocally
20 instructed Defendants and their agents to stop calling her cell phone.

21 19. On August 11, Plaintiff filed a voluntary petition seeking relief under Chapter
22 13 of the Bankruptcy Code and amended the relevant schedules to include “Dell” as a potential
23 creditor on August 26, 2011.

24 20. Dell was sent notice of the automatic stay and the meeting of creditors on
25 August 25, 2011 and received that written notice shortly thereafter.

1 21. The written notice received by Dell included instructions that all debt collection
2 efforts relating to Plaintiff must immediately cease. Specifically, Dell was instructed that
3 "Common examples of prohibited actions include contacting the debtor by telephone, mail or
4 otherwise to demand repayment"

5 22. Despite actual knowledge of Plaintiff's bankruptcy proceedings and ignoring
6 Plaintiff's repeated instructions to cease contact, Defendants or an agent or contractor acting on
7 their behalf nevertheless placed more than 100 calls to Plaintiff's cellular telephone using an
8 automatic telephone dialing system.

9 23. Defendants acted willfully or knowingly or both in calling numbers using an
10 autodialer without regard to the TCPA or whether the number was assigned to a cellular
11 telephone.

12 24. In calling Plaintiff on her cellular telephone lines dozens of times at multiple
13 times per day, Defendants violated 47 U.S.C. § 227(b).

14 **III. CLASS ACTION ALLEGATIONS**

15 25. Plaintiff brings this class action pursuant to Federal Rule of Civil Procedure 23
16 on behalf of herself and on behalf of all others similarly situated.

17 26. The proposed Class that Plaintiff seeks to represent is defined as follows:

18 All persons within the United States who, on or after August 1, 2008,
19 received an non-emergency telephone call from Defendants to a cellular
20 telephone through the use of an automatic telephone dialing system or an
artificial or prerecorded voice and who did not provide prior express
consent for such calls.

21 27. Collectively, these persons will be referred to as "Class members." Plaintiff
22 represents, and is a member of, the Class. Excluded from the Class are Defendants and any
23 entities in which Defendants or their subsidiaries or affiliates have a controlling interest,
24 Defendants' agents and employees, the judicial officer to whom this action is assigned and any
25
26
27

1 member of the court staff and immediate family, and claims for personal injury, wrongful
2 death, and emotional distress.

3 28. Plaintiff does not know the exact number of members in the Class, but based
4 upon Defendants' public statements regarding their business in the United States, Plaintiff
5 reasonably believes that Class members number at minimum in the hundred thousands. This
6 Class size includes consumers who are borrowers on a consumer loan serviced or co-serviced
7 by Defendants, as well as persons who co-signed for such debts; other consumer and business
8 loans serviced by Defendants or their affiliates; persons who received telemarketing
9 solicitations and other notices from Defendants, whether by means of a voice call or text
10 message; and all other persons whom Defendants or their affiliates, agents, contractors, or
11 employees dialed (or mis-dialed).

12 29. There are questions of law and fact common to the members of the Class that
13 predominate over any questions affecting only individual members, including, whether
14 Defendants made any call (other than a call made for emergency purposes or made with the
15 prior express consent of the called party) using any automatic telephone dialing system or an
16 artificial or prerecorded voice to any telephone number assigned to a paging service, cellular
17 telephone service, specialized mobile radio service, or other radio common carrier service, or
18 any service for which the called party is charged for the call, in violation of the TCPA.

19 30. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff
20 has no interests antagonistic to those of the Class, and Defendants have no defenses unique to
21 Plaintiff.

22 31. Plaintiff will fairly and adequately protect the interests of the Class, and has
23 retained attorneys experienced in class and complex litigation.

24 32. A class action is superior to all other available methods for the fair and efficient
25 adjudication of this controversy for the following reasons:

1 a. It is economically impractical for members of the Class to prosecute
2 individual actions;
3 b. The Class is readily definable; and
4 c. Prosecution as a class action will eliminate the possibility of repetitious
5 litigation.

6 33. A class action will cause an orderly and expeditious administration of the claims
7 of the Class. Economies of time, effort, and expense will be fostered and uniformity of
8 decisions will be ensured.

9 34. Class wide relief is essential to compel Defendants to comply with the TCPA.
10 The interest of Class members in individually controlling the prosecution of separate claims
11 against Defendants is small because the statutory damages in an individual action for violation
12 of the TCPA are small. Management of these claims is likely to present significantly fewer
13 difficulties than are presented in many class claims because the calls at issue are all automated
14 and the Class members, by definition, did not provide the prior express consent required under
15 the statute to authorize calls to their cellular telephones.

16 35. Defendants have acted on grounds generally applicable to the Class, thereby
17 making final injunctive relief and corresponding declaratory relief with the respect to the Class
18 First Claim for Relief

19 36. Plaintiff re-alleges and incorporate by reference the above paragraphs as though
20 set forth fully herein.

21 37. The foregoing act and omissions of Defendants constitute numerous and
22 multiple violations of the TCPA, including but not limited to each of the above-cited provisions
23 of 47 U.S.C. § 227 *et seq.*

38. As a result of Defendants' negligent violations of the TCPA, Plaintiff and Class members are entitled to an award of \$500 in statutory damages for each and every call placed in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

39. Plaintiff and all Class members are also entitled to and do seek injunctive relief prohibiting such negligent conduct that violates the TCPA by Defendants in the future.

IV. SECOND CLAIM FOR RELIEF

40. Plaintiff re-alleges and incorporate by reference the above paragraphs as though set forth fully herein.

41. The foregoing acts and omissions of Defendants constitute numerous and multiple knowing or willful, or both, violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

42. As a result of Defendants' knowing and willful violations of the TCPA, Plaintiff and each member of the Class are entitled to treble damages of up to \$1,500 for each and every call in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

43. Plaintiff and Class members are also entitled to and do seek injunctive relief prohibiting such willful conduct that violates the TCPA by Defendants in the future.

44. Plaintiff demands a jury trial on each of the causes of action set forth above, including the amount of statutory damages.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that judgment be entered against Defendants Dell Inc. and Dell Financial Services LLC for the following:

A. An injunction against the calling of cellular telephones by Defendants and their contractors, agents and employees, except where the cellular telephone subscriber has provided prior express consent to the calls;

B. Damages pursuant to 47 U.S.C. § 227(b)(3);

- C. Costs of litigation and reasonable attorneys' fees; and
- D. Such other and further relief as the Court may deem just and proper.

VI. DEMAND FOR JURY

Plaintiff demands a jury for all issues so triable.

RESPECTFULLY SUBMITTED AND DATED this 8th day of October, 2012.

TERRELL MARSHALL DAUDT & WILLIE PLLC

By: /s/ Beth E. Terrell, CSB #178181

Beth E. Terrell, CSB #178181

Email: bterrell@tmdwlaw.com

Kimberlee L. Gunning, *Admitted Pro Hac Vice*

Email: kgunning@tmdwlaw.com

936 North 34th Street, Suite 400

Seattle, Washington 98103-8869

Telephone: (206) 816-6603

Facsimile: (206) 350-3528

Gayle Blatt, CSB #122048

Email: gmb@cglaw.com

Mark Ankcorn, CSB #166871

Email: mark@cglaw.com

CASEY GERRY SCHENK F
PLATE 3, BENEFIELD LTD.

BLATT & PENFIELD 11

110 Laurel Street
San Diego, Calif. 92101

San Diego, California 92101-1486
Telephone (619) 238-1811

Telephone: (619)
Facsimile: (619)

Facsimile: (619) 544-9232

causes for Plaintiff and the Pro

Keys for *Trichomyces* and the *Trichomyces* group

Attorneys for Plaintiff and the Proposed Class

FIRST AMENDED COMPLAINT - 9
CASE No. 3:12-cv-01899-H-RBB

CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on October 8, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

C. Brandon Wisoff, CSB #121930
Email: bwisoff@fbm.com
Diego Acevedo, CSB #244693
Email: dacevedo@fbm.com
ARELLA BRAUN + MARTEL LLP
235 Montgomery Street, 17th Floor
San Francisco, California 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Paul Schlaud, *Admitted Pro Hac Vice*
Email: pschlaud@reevesbrightwell.com
Sinead O'Carroll, *Admitted Pro Hac Vice*
Email: socarroll@reevesbrightwell.com
REEVES & BRIGHTWELL LLP
221 West Sixth Street, Suite 1000
Austin, Texas 78701-3410
Telephone: (512) 334-4500
Facsimile: (512) 334-4492

Attorneys for Defendants

DATED this 8th day of October, 2012.

TERRELL MARSHALL DAUDT & WILLIE PLLC

By: /s/ Beth E. Terrell, CSB #178181

Beth E. Terrell, CSB #178181
Email: bterrell@tmdwlaw.com
936 North 34th Street, Suite 400
Seattle, Washington 98103-8800
Telephone: (206) 816-6603
Facsimile: (206) 350-3528

Attorneys for Plaintiff and the Proposed Class